

GEORGIA

1. Citation for the state's workers' compensation statute

Official Code of Georgia Annotated ("O.C.G.A."), §§ 34-9-1, et seq.

SCOPE OF COMPENSABILITY

2. Who are covered "employees" for purposes of workers' compensation?

Covered employees are generally those who are hired to work for employers with three (3) or more full or part-time employees. Officers of corporations may elect to be exempt from coverage by providing written notice to the insurer or, if there is no insurer, to the State Board of Workers' Compensation. O.C.G.A. § 34-9-2.1. Specifically, if the employer's business is incorporated, the corporation is considered to be the employer and all active officers are considered to be employees of the business. As many as five officers may waive coverage on themselves. However, by waiving coverage on themselves, the officers do not exempt themselves from being counted in the "three or more employees" rule, unless the exemptions reduce the employee count to zero. O.C.G.A. § 34-9-2.1(a)(3); Hitchcock v. Jack Wiggins, Inc., 249 Ga. App. 845, 848, 549 S.E.2d 806 (2001). In contrast, sole proprietors and partners in partnerships are considered to be *employers*, not employees. Therefore, these people are not counted in the "three or more employee computation." However, they can elect to be covered as an employee by advising the business's insurance carrier. O.C.G.A. § 34-9-2.2.

An "employee" is broadly defined as any person under the employ of another, under any contract of hire or apprenticeship, written or implied, except for a person whose employment is not in the usual course of the trade, business, occupation, or profession of the employer. O.C.G.A. § 34-9-1. The fact that an employee is not paid for services rendered does not, in and of itself, prohibit that person from being an employee. If the employer retains the right to control the time, manner, and method of performing the work and receives valuable services from the worker, the worker can still be an employee. Housing Auth., City of Cartersville v. Jackson, 226 Ga. App. 182, 183-84, 486 S.E.2d 54 (1997); MCG Health, Inc. v. Nelson, 270 Ga. App. 409, 413, 606 S.E.2d 576 (2004).

The exclusions from coverage under the Act are codified in O.C.G.A. § 34-9-2. Generally, the following categories of employment are excluded from coverage: (i) rail common carriers engaged in interstate or intrastate commerce (O.C.G.A. § 34-9-2(a)(2)-(3)); (ii) farm laborers (which term has been given a very broad interpretation; see Glen Oak's Turf, Inc. v. Butler, 191 Ga. App. 840, 383 S.E.2d 203 (1989)); (iii) domestic servants; (iv) licensed real estate salespeople or associate

brokers; and (v) independent contractors who fall under the statutory definition of O.C.G.A. § 34-9-2(c). Employees and their employers can voluntarily accept the provisions of the Act, despite any statutory exemption. Farm laborers are allowed to do so by a specific statute. O.C.G.A. § 34-9-2.3.

3. Identify and describe any "statutory employer" provision.

O.C.G.A. § 34-9-8. Generally, the issue arises in the context of construction contractors. If the immediate employer does not regularly have three employees, then the claim may be presented to the intermediate or principal contractor. The intermediate or principal contractor also must meet the numerical qualification. Bradshaw v. Glass, 252 Ga. 429, 431, 314 S.E.2d 233 (1984); G & M Quality Builders, Inc. v. Dennison, 256 Ga. 617, 618, 351 S.E.2d 622 (1987).

4. What types of injuries are covered and what is the standard of proof for each:

A. Traumatic or "single occurrence" claims.

In order for a claim to be compensable it must be an "accident arising out of and in the course of employment." O.C.G.A. § 34-9-1(4). Almost any physical injury is considered covered if it occurs: (i) within the period of employment; (ii) at a place where the employee reasonably may be in the performance of duties; and (iii) while the employee is fulfilling the duties or engaged in an activity incidental thereto. Coleman v. Columns Props., Inc., 266 Ga. 310, 311, 467 S.E.2d 328 (1996).

B. Super added injuries.

"Super-added injuries," subsequent injuries that are caused by the worker's compensation injury, are compensable as part of the total disability calculation. City of Buford v. Thomas, 179 Ga. App. 769, 774, 347 S.E.2d 713 (1986). See also Noles v. Aragon Mills, 116 Ga. App. 560, 158 S.E.2d 261 (1967); Clark v. Liberty Mut. Ins. Co., 108 Ga. App. 806, 807, 134 S.E.2d 534 (1963); Fieldcrest Mills, Inc. v. Richard, 141 Ga. App. 702, 703, 234 S.E.2d 345 (1977) (each discussing super-added injuries resulting "in consequence of" or "as a consequence of" the initial injury). The Georgia Court of Appeals has held that "[a]n employee sustains a compensable superadded injury when, *as a result of a work-related disability to one part of the body*, the employee suffers a disabling injury to another part of the body." Lowndes County Bd. of Comm'rs v. Connell, 305 Ga. App. 844, 850 (2), 701 S.E.2d 227 (2010); Baugh-Carroll v. Hosp. Auth. of Randolph County, 248 Ga. App. 591, 595 (2), 545 S.E.2d 690 (2001). For example, in Baugh-Carroll, a former nurse had sought compensation for "unbearable pain" in her second knee, which was determined by the Board of

Workers' Compensation to have been "at least aggravated, if not caused, by her original on-the-job accident and injury to her first knee years before. On appeal, the Georgia Court of Appeals held that the evidence supported the Board's finding that the nurse had suffered a compensable super-added injury. Baugh-Carroll, 248 Ga. App. at 595, 545 S.E. 2d at 694. See also W. Point Pepperell, Inc. v. Baggett, 139 Ga. App. 813, 229 S.E.2d 666 (1976) (affirmed award of the Board of Workers' Compensation which included compensation for the superadded injury of the development of acute schizophrenia resulting from the claimant's original, work-related physical injury).

C. Occupational disease (including respiratory and repetitive use).

The occupational disease statute was drastically changed, both substantively and procedurally, in 1987. For claims arising after that date the law is less technical and requires proof of the following essential elements: (1) a direct causal connection between the conditions under which the work is performed and the disease; (2) the disease followed as a natural incident of exposure by reason of the employment; (3) the disease is not of a character to which the employee may have had substantial exposure outside of the employment; (4) the disease is not an ordinary disease of life to which the general public is exposed; and (5) the disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence. O.C.G.A. § 34-9-280(2).

Such a claim must be made within one year after the employee knew or in the exercise of reasonable diligence should have known of both the disablement and its relationship to the employment. O.C.G.A. § 34-9-281(b)(2). The claim will also be barred if it is not filed within seven years from the date of the last injurious exposure. Id. Georgia statutory law specifically provides that an employee with asbestosis or mesothelioma related to exposure to asbestos, however, must file any claim for disablement within one year from the date of first disablement after diagnosis of such disease. Id. In any event, in cases of death where the cause of action was not barred during the employee's life, the claim must be filed within one year of the date of death. Id. Additionally, in order to be a compensable injury under the Workers' Compensation Act, the disease must arise out of and in the course of the employment; it must be contracted while the employee is so engaged; and it must result from a hazard characteristic of the employment in excess of the hazards of such disease attendant to employment in general. O.C.G.A. § 34-9-281(b)(1).

D. Aggravation of pre-existing injury.

An aggravation of a pre-existing injury is also compensable but only so long as the aggravation continues to be the cause of the claimant's disability. O.C.G.A. § 34-9-1(4).

5. What, if any, injuries or claims are excluded?

Several situations can remove an injury from the covered "arising out of" category, such as the following:

A. Deviation from the employee's regular job at time of injury.

"[W]here the employee steps aside from his employer's business to do some act of his own, not connected with his employer's business, the relationship of employer and employee, or master and servant, is, as to that act, completely suspended, and an accident occurring at that time, resulting in injury to the employee, does not arise out of the employment within the meaning of the Workmen's Compensation Act." S. Ga. Timber Co. v. Petty, 218 Ga. App. 497, 498, 462 S.E.2d 176 (1995); Stokes v. Coweta County Bd. of Ed., 313 Ga. App. 505, 509, fn. 5 (2012). In Petty, for example, the Georgia Court of Appeals held that where an employee was abducted at knifepoint, her resultant injury did not arise out of the course of her employment for workers' compensation purposes because the employee's abduction occurred a substantial distance away from any place she would have been on the business of her employer, the deviation was to conduct personal business, and she had not yet resumed her duties to her employer at the time she was attacked. Petty, 218 Ga. App. at 498-99.

B. Practical jokes and "horseplay."

Similarly, an injury is not compensable where it occurs while the employee is engaged in playing a practical joke or is involved in "sport or horseplay" during working hours. See Univ. Underwriters Ins. Co. v. Ga. Auto. Dealers' Ass'n Group Self-Insurers' Fund, 182 Ga. App. 595, 597, 356 S.E.2d 686 (1987); Kight v. Liberty Mut. Ins. Co., 141 Ga. App. 409, 410, 233 S.E.2d 453 (1977); Am. Fire and Cas. Co. v. Gay, 104 Ga. App. 840, 123 S.E.2d 287 (1961); Givens v. Travelers Ins. Co., 71 Ga. App. 50, 51, 30 S.E.2d 115 (1944); Fid. & Cas. Co. v. Scott, 215 Ga. 491, 494, 111 S.E.2d 223 (1959).

C. Willful misconduct, attempts to injure others, or willful failure to use safety appliance or perform duty required by statute.

Any injury or death is not compensable if it results from the employee's willful misconduct, including intentionally self-inflicted injury, or growing out of his or her attempt to injure another, or from a willful failure or refusal to use a safety appliance or to perform some duty required by

statute. O.C.G.A. § 34-9-17(a). An employee's commission of a criminal act generally is considered "willful misconduct." See Roy v. Norman, 261 Ga. 303, 304, 404 S.E.2d 117 (1991); Aetna Life Ins. Co. v. Carroll, 169 Ga. 333, 343, 150 S.E. 208 (1929). Specifically, the Georgia Supreme Court has defined "willful misconduct" as "conduct of a criminal or quasicriminal nature, the intentional doing of something, either with the knowledge that it is likely to result in serious injury, or with the wanton and reckless disregard of its probable consequences." Roy, 261 Ga. at 304. By contrast, mere negligence, gross negligence, "inadvertent, unconscious, or involuntary violations" of statutes, instructions, orders, rules, or ordinances, and even the commission of hazardous acts with respect to which the resultant danger is obvious, do not constitute willful misconduct or willful failure to perform a duty required by statute. Id.; Carroll, 169 Ga. at 333-34. Similarly, traffic violations such as excessive speeding generally are not considered to amount to "willful misconduct." See Ga. Dep't of Pub. Safety v. Collins, 140 Ga. App. 884, 886, 232 S.E.2d 160 (1977). *But see* Young v. Am. Ins. Co., 110 Ga. App. 269, 270, 138 S.E.2d 385 (1964) (holding that employee's act of driving approximately 100 miles per hour after being asked by a coworker to slow down constituted willful misconduct).

D. Accidents occurring while employee is traveling to or from work.

Generally, "accidents occurring while an employee is traveling to and from work do not arise out of and in the course of employment, and therefore injuries sustained during that time are not compensable" under Georgia's workers' compensation scheme. Collie Concessions, Inc. v. Bruce, 272 Ga. App. 578, 580 (1), 612 S.E.2d 900 (2005); Connell v. Head, 253 Ga. App. 443, 444, 559 S.E.2d 73 (2002); Chattanooga Publ'g Co. v. Fulton, 215 Ga. 880, 883 (3), 114 S.E.2d 138 (1960). See also Farzaneh v. Merit Constr. Co., 309 Ga. App. 637, 639, 710 S.E.2d 839 (2011).

However, this rule does not apply, and an injury *will* be deemed to have arisen from the course and scope of employment, under the following circumstances: (i) where the employer furnishes transportation to the employee; (ii) where the employee is doing some act permitted or required by the employer and beneficial to the employer while en route to and from work; (iii) where the employee is going to and from parking facilities provided by the employer (often called the "parking lot" exception); (iv) where an employee is "on call" and furnishes or is reimbursed for his transportation costs; (v) where the employee is engaged in a "special task" for the employer; or (vi) where the employee is required to travel as part of his employment. Collie, 272 Ga. App. at 580 (1); Harrison v. Winn Dixie Stores, Inc., 247 Ga. App. 6, 7-8, 542 S.E.2d 142 (2000); Corbin, 117 Ga. App. at 823; Employer's Liab. Assurance Corp. v. Pruitt, 63 Ga. App. 149, 10 S.E.2d 275 (1940) (discussing scope of employment with regard to a "traveling" employee).

The "parking lot" exception does not apply, and workers' compensation benefits have been held to be unavailable, with respect to injuries sustained going to or from, or while an employee is on,

any parking lot not owned, controlled, or maintained by the employer. Collie, 272 Ga. App. at 581; City of Atlanta v. Spearman, 209 Ga. App. 644, 434 S.E.2d 87 (1993); Tate v. Bruno's, Inc./Food Max, 200 Ga. App. 395, 397, 408 S.E.2d 456 (1991).

E. Accidents occurring during “lunch breaks” or other breaks from work.

An injury is compensable where it arises from an accident occurring while an employee is on a scheduled lunch break (or other scheduled break) and is not involved in any activity in furtherance of the employer's business, as long as the worker is free to leave the employer's premises during lunch break. Ocean Accident & Guar. Corp. v. Farr, 180 Ga. 266, 178 S.E. 728 (1935). See also Coe v. Carroll & Carroll, Inc., 308 Ga. App. 777, 783 (2), 709 S.E.2d 324 (2011). But see Edwards v. State, 173 Ga. App. 87, 325 S.E.2d 437 (1984) (holding that claimant was acting within scope of employment when she fell while picking up lunch for her supervisor). By contrast, "if an employer . . . operates a cafeteria on its premises, in the immediate vicinity of the work, at which its employees are, expressly or by fair implication, invited to eat, and they accept the invitation by using the facilities provided, the relation of master and servant is not temporarily suspended during the noon hour of such employees." Holman v. Am. Auto Ins. Co., 201 Ga. 454, 459, 39 S.E.2d 850 (1946).

The general rule in this regard is that “where a scheduled rest break or lunch break is provided to employees during which the employee is free to use the time as he chooses, making it personal to him, an injury occurring during the break period arises out of an individual pursuit and not out of his employment and is not compensable.” ATC Healthcare Serv., Inc. v. Adams, 263 Ga. App. 792, 793, 589 S.E.2d 346 (2003); Home Indem. Co. v. Swindle, 146 Ga. App. 520, 520, 246 S.E.2d 507 (1978); Wilkie v. Travelers Ins. Co., 124 Ga. App. 714, 715, 185 S.E.2d 783 (1971). But see Rockwell v. Lockheed Martin Corp., 248 Ga. App. 73, 73, 545 S.E.2d 121 (2001) (“Where the employee is still on her employer's premises in the act of egressing those premises, even if on break, then the Workers' Compensation Act does apply.”). By contrast, “if the employee sustains an injury while conducting the employer's business or following job-related instructions during the ‘break,’ the injury is compensable” as a work-related injury. Swindle, 146 Ga. App. at 520; Wilkie, 124 Ga. App. at 715. See also Employer's Mut. Ins. Co. v. Carlan, 104 Ga. App. 170, 121 S.E.2d 316 (1961).

Accidents which occur during an *unscheduled* break to visit the restroom are compensable incidents for purposes of workers' compensation. Twin City Fire Ins. Co. v. Graham, 139 Ga. App. 318, 319, 228 S.E.2d 355 (1976); Edwards v. Liberty Mut. Ins. Co., 130 Ga. App. 23, 202 S.E.2d 208 (1973). But see Wilkie, 124 Ga. App. 714, 185 S.E.2d 783 (1971) (holding that accident which occurred while employee was en route to restroom during a *scheduled* ten-minute break was not compensable).

F. Idiopathic injuries.

To be compensable, there must be a causal connection between the employment and the injury and the injury must be the rational consequence of some hazard connected to the employment. Harris v. Peach County Bd. of Comm'rs, 296 Ga. App. 225, 227, 674 S.E.2d 36 (2009); Davis v. Houston Gen. Ins. Co., 141 Ga. App. 385, 233 S.E.2d 479 (1977). Thus, even where an injury occurs at the employee's place of employment, the injury will not be compensable for workers' compensation purposes if it "can not fairly be traced to the employment as a contributing proximate cause and [it] comes from a hazard to which the workman would have been equally exposed apart from the employment." Harris, 296 Ga. App. at 227; Davis, 141 Ga. App. at 386.

Hernias, however, are treated differently under Georgia workers' compensation law. See O.C.G.A. § 34-9-266. For a hernia to be deemed a compensable injury, the burden generally is on the employee to definitely prove that the hernia: (i) resulted from an injury; (ii) appeared suddenly; (iii) was accompanied by pain; (iv) immediately followed an accident; and (v) was not pre-existing. Id.

Similarly, heart disease, heart attack, failure or occlusion of any coronary blood vessel, stroke, or thrombosis will only be deemed compensable for workers' compensation purposes where it is shown "by a preponderance of competent and credible evidence, which shall include medical evidence," that such injury or condition is attributable to the performance of the employee's usual work or employment. O.C.G.A. § 34-9-1(4).

6. What psychiatric claims or treatments are compensable?

Under Georgia workers' compensation law, psychological injury is compensable, if two conditions are satisfied: (i) the psychological injury arises out of an accident in which a compensable physical injury was sustained; and (ii) while the physical injury need not be the precipitating cause of the psychological condition or problems, at a minimum, the physical injury must contribute to the continuation of the psychological trauma. DeKalb County Bd. of Educ. v. Singleton, 294 Ga. App. 96, 100, 668 S.E.2d 767 (2008); Abernathy v. City of Albany, 269 Ga. 88, 88-89, 495 S.E.2d 13 (1998). See also The Coca-Cola Co. v. Parker, 297 Ga. App. 481, 677 S.E.2d 361 (2009). While non-trauma induced illnesses or injuries are not generally compensable, long-term, stress-type claims may be compensable as "occupational disease." See O.C.G.A. § 34-9-280.

7. What are the applicable statutes of limitations?

A claim is barred unless filed within one year after the injury, or within one year after the last medical treatment provided by the employer, unless payment of weekly benefits has been made,

in which case the claim may be filed within one year after the date of the last remedial treatment or within two years after the date of the last payment of weekly benefits. O.C.G.A. § 34-9-82(a). In death cases, any claim must be filed within one year after death. O.C.G.A. § 34-9-82(b). Any statute of limitation defense must be raised at the first hearing or else will be deemed to have been waived. Board Rule 82. *See also* Section 27 below. Additionally, there is a four-year statute for permanent partial disability benefits. O.C.G.A. § 34-9-104(b).

8. What are the reporting and notice requirements for those alleging an injury?

Notice must be given within 30 days after an accident. O.C.G.A. § 34-9-80. Exceptions to this requirement exist where: (i) the employee is prevented from giving notice by reason of physical or mental incapacity, or by reason of fraud or deceit by the employer; (ii) the employer, agent, representative, or supervisor knew of the accident; or (iii) there is a reasonable excuse made to the satisfaction of the Board, and the employer was not prejudiced by the lack of notice. *Id.* The employee does not need to give notice of a claim; notice of an injury alleged to have occurred at work is sufficient. *Jones v. Fieldcrest Mills, Inc.*, 162 Ga. App. 848 (1982). Notice has been deemed insufficient where the employee merely reported that he was returning to work after a heart attack, when no symptoms of the heart attack were apparent at work and where he did not give any indication to his employer that he would seek benefits for the same. *Schwartz v. Greenbaum*, 138 Ga. App. 695 (1976).

9. Describe available defenses based on employee conduct:

A. Self-inflicted injury.

Self-inflicted injuries are not compensable. O.C.G.A. § 34-9-17(a). *See also* Section 5.C. above.

B. Willful misconduct, "horseplay," etc.

Injuries arising out of willful misconduct, assaults, or willful failure to use a safety appliance or perform a duty required by statute are not compensable under workers' compensation. O.C.G.A. § 34-9-17(a). *See also* Section 5.C. above.

C. Injuries involving drugs and/or alcohol.

No compensation is allowable under Georgia's Workers' Compensation Act for injury or death due to alcohol intoxication or being under the influence of marijuana or a controlled substance, except where the substance was prescribed for the employee and taken by the employee in accordance with the prescription. O.C.G.A. § 34-9-17(b). There arises a rebuttable presumption that an accident was caused by an employee's consumption of alcohol and/or drugs where: (i) the amount of alcohol in an employee's blood within three (3) hours of the time of the accident exceeds .08 grams (per liter); (ii) any amount of marijuana or controlled substance is in the employee's blood within eight (8) hours of the time of the accident; or (iii) the employee refuses to submit to a reliable scientific test to determine the presence of alcohol or a controlled substance in the employee's blood, urine, breath or other bodily substance. O.C.G.A. § 34-9-17(b). Drug addiction or disabilities resulting therefrom are compensable only when the addiction or disability results from the use of medication provided by the treating physician for the original work injury. O.C.G.A. § 34-9-1(4).

10. What, if any, penalties or remedies are available in claims involving fraud?

Attorney's fees and reasonable litigation expenses may be assessed against a party if it is determined that the proceedings have been brought, prosecuted, or defended in whole or in part without reasonable grounds. O.C.G.A. § 34-9-108(b)(1), (b)(4). The "reasonable litigation expenses" that may be recovered are limited to witness fees and mileage, reasonable expert witness fees, reasonable deposition transcript costs, and the cost of the hearing transcript. O.C.G.A. § 34-9-108(b)(4).

In addition, the Board has the authority to assess a civil penalty between \$1,000.00 and \$10,000.00 in the event it determines that anyone has intentionally made a false or misleading statement to obtain or to attempt to deny benefits. O.C.G.A. §§ 34-9-18(b), 34-9-19. A civil penalty of between \$500.00 and \$5,000.00 also may be assessed against any employer who fails to carry insurance or to file proper insurance forms with the Board, and the fraud unit even may seek criminal prosecution in such instances. O.C.G.A. §§ 34-9-18(c), 34-9-121, 34-9-126(a).

In the event that an employer fails to comply with any provision regarding the "Method of Payment" under O.C.G.A. § 34-9-221, absent reasonable grounds for such failure, if a claimant thereafter retains an attorney to enforce his rights and subsequently prevails on such claim, the Board may determine and assess against the employer the reasonable *quantum meruit* fees of the attorney, as well as the costs of the proceedings. O.C.G.A. § 34-9-108(b)(2).

Regarding fraud by misrepresentation of a physical condition in an application for employment, see Section 11 below.

11. Is there any defense for falsification of employment records regarding medical history?

Fraud by misrepresentation of physical condition by an employee in an application for employment can serve as a complete defense to a subsequent workers' compensation claim by the offending employee. Caldwell v. Aarlin/Holcombe Armature Co., 267 Ga. 613, 613, 481 S.E.2d 196 (1997); Ga. Elec. Co. v. Rycroft, 259 Ga. 155, 158, 378 S.E.2d 111 (1989). The conditions which must be met in such instance are: (i) the employee knowingly and willfully made a false representation as to his physical condition; (ii) the employer relied upon the employee's false representation and this reliance was a substantial factor in hiring the employee; and (iii) there was a causal connection between the employee's false representation and his injury. Caldwell, 267 Ga. at 613. There is some authority suggesting that such misrepresentations may be actionable even if oral, rather than written. See Saunders v. Bailey, 205 Ga. App. 808, 809, 423 S.E.2d 688 (1992). Moreover, no compensation is payable for an occupational disease if the employee falsely represents in writing to the employer that he or she has not been previously disabled, laid-off, or compensated in damages or otherwise because of such disease. O.C.G.A. § 34-9-291.

Note, however, that the sufficiency of this defense is in question now that the Subsequent Injury Trust Fund no longer exists.

12. Are injuries during recreational and other non-work activities paid for or supported by the employer compensable?

"Recreational or social activities are within the course of employment, and thus subject to the Workers' Compensation Act, if (i) they occur on work premises during a lunch or recreation period as a regular incident of employment, or (ii) employee participation is required, either expressly or by implication, or (iii) the employer derives a substantial benefit from the event beyond the improvement in employee health and morale that is common to all kinds of recreational or social activities." Pizza Hut of Am., Inc. v. Hood, 198 Ga. App. 112, 112 (1), 400 S.E.2d 657 (1990); Crowe v. Home Indem. Co., 145 Ga. App. 873, 245 S.E.2d. 75 (1978). See also City Council of Augusta v. Nevils, 149 Ga. App. 688, 689, 255 S.E.2d 140 (1979), citing 1A Larson, Law of Workmen's Compensation, 5-101, 5-106, § 22.24 (1979 Rev.) (listing four variables which are "useful" in making the determination of whether an employee's injury while participating in a company-related athletic team is compensable under workers' compensation).

13. Are injuries by co-employees compensable?

Yes, unless the injury is the result of a willful act for personal reasons. O.C.G.A. §§ 34-9-1, 34-9-17.

14. Are acts by third parties unrelated to work but committed on the premises, compensable (e.g., "irate paramour" claims)?

Generally not. O.C.G.A. § 34-9-1. However, the Georgia Court of Appeals has adopted the "positional risk" theory, which states that if the employment is such as to place the employee in the locale of the peril, then the injury is compensable, even if any other person would have been injured irrespective of employment. See Chaparral Boats, Inc. v. Heath, 269 Ga. App. 339, 342 (1), 606 S.E.2d 567 (2004); Nat'l Fire Ins. Co. v. Edwards, 152 Ga. App. 566, 567 (1), 263 S.E.2d 455 (1979). *But see* Collie Concessions, Inc. v. Bruce, 272 Ga. App. 578, 584-85, 612 S.E.2d 900 (2005) (rejecting applicability of the "positional risk" doctrine under the peculiar facts of that case).

BENEFITS

15. What criterion is used for calculating the average weekly wage?

As long as the employee in question worked in the same employment for "substantially the whole" of the thirteen (13) weeks immediately preceding the injury, then his average weekly wage is calculated as one-thirteenth (1/13) of the total wages the employee earned during that 13-week period. O.C.G.A. § 34-9-260(1). If the employee was not employed in such capacity for substantially the whole of the previous 13-week period, then the amount of wages of a similarly situated employee during that time period is used. O.C.G.A. § 34-9-260(2). Finally, if neither of the above methods can be "reasonably and fairly" applied to the subject employee, then the full-time weekly wage of the employee is used. O.C.G.A. § 34-9-260(3).

16. How is the rate for temporary/lost time benefits calculated, including minimum and maximum rates?

The temporary total disability rate is determined on the basis of two-thirds of the employee's average weekly wage, not to exceed \$500.00 nor to be less than \$50.00 per week. However, when the weekly wage is below \$50.00, the employer should pay a weekly benefit equal to the average weekly wage. O.C.G.A. § 34-9-261.

17. How long does the employer/insurer have to begin temporary benefits from the date disability

begins?

Payment is due on the twenty-first (21st) day after the employer has knowledge of the injury or death, and thereafter on a weekly basis. O.C.G.A. § 34-9-221(b). Payments are considered made when mailed. Id.

18. What is the "waiting" or "retroactive" period for temporary benefits (e.g., must be out _____ days before recovering benefits for the first _____ days)?

The employee must be out of work twenty-one (21) consecutive days before recovering benefits for the first seven (7) days of incapacity. O.C.G.A. § 34-9-220.

19. What is the standard/procedure for terminating temporary benefits?

Temporary benefits are suspended by filing a Form WC2. Benefits may be unilaterally suspended in certain situations such as normal duty work release by the treating physician. If the employee has not returned to work, ten (10) days' advance notice is required, and benefits must be paid during this period. There are other restrictions, and where the employee's release to return to work is accompanied by restrictions, a hearing and an order of the Board are required except in cases where there has been a statutory "offer of suitable employment" pursuant to O.C.G.A. § 34-9-240. If an employee attempts the new job for fifteen (15) days and is unable to physically perform the new duties, temporary total benefits must be reinstated immediately. Interlocutory orders pending a hearing are available on proper motion.

20. Is the amount of temporary total disability paid credited toward the amount entitled for permanent partial disability?

No. However, an employee is not entitled to benefits for temporary total disability or temporary partial disability at the same time he or she is receiving benefits for permanent partial disability. *But see Cedartown Nursing Home v. Dunn*, 174 Ga. App. 720, 330 S.E.2d 905 (1985) (holding simultaneous payment authorized for separate injuries).

21. What disfigurement benefits are available and how are they calculated?

None.

22. How are permanent partial disability benefits calculated, including the minimum and maximum rates?

A. How many weeks are available for scheduled members/parts, and the standard for recovery?

According to O.C.G.A. § 34-9-263(c), for a permanent partial disability claim, the employer must pay weekly income benefits equal to two-thirds (2/3) of the employee's average weekly wage for the number of weeks determined by the percentage of bodily loss or loss of use times the maximum weeks as follows:

| <u>Bodily Loss</u> | <u>Maximum Weeks</u> |
|-----------------------------|----------------------|
| Arm | 225 |
| Leg | 225 |
| Hand | 160 |
| Foot | 135 |
| Thumb | 60 |
| Index Finger | 40 |
| Middle Finger | 35 |
| Ring Finger | 30 |
| Little Finger | 25 |
| Great Toe | 30 |
| Any other toe | 20 |
| Loss of Hearing, Traumatic: | |
| One Ear | 75 |
| Both Ears | 150 |
| Loss of Vision (one eye): | 150 |
| Body as a Whole | 300 |

B. Number of weeks for "whole person" and standard for recovery.

There is a 400-week maximum for total disability claims, unless the claim is catastrophic, in which case the weekly benefit shall be paid until the employee undergoes a “change in condition for the better.” O.C.G.A. § 34-9-261. See also O.C.G.A. § 34-9-200.1(g) (defining “catastrophic injury”); O.C.G.A. § 34-9-104(a)(1) (defining “change in condition”).

23. Are there any requirements/benefits for vocational rehabilitation, and what is the standard for recovery?

No, except for those injuries designated as “catastrophic,” with respect to which vocational rehabilitation is mandatory. O.C.G.A. § 34-9-200.1. There are very detailed rules governing rehabilitation, which rules should be carefully scrutinized in such cases and which can be found in O.C.G.A. § 34-9-200.1.

24. How are permanent total disability benefits calculated, including the minimum and maximum rates?

Permanent total disability benefits are paid at two-thirds (2/3) of the employee's average weekly wage, not to exceed \$500.00 per week nor to be less than \$50.00 per week, and shall continue for a period not to exceed 400 weeks from the date of injury. O.C.G.A. § 34-9-261. In the instance of a “catastrophic injury,” the weekly benefit shall be paid until the employee undergoes a “change in condition for the better.” O.C.G.A. § 34-9-261. See also O.C.G.A. § 34-9-200.1(g) (defining “catastrophic injury”); O.C.G.A. § 34-9-104(a)(1) (defining “change in condition”). The average weekly wage is determined as set forth in Section 15 above.

25. How are death benefits calculated, including the minimum and maximum rates?

A. Funeral expenses.

Reasonable expenses of the employee’s last sickness and burial are compensable up to \$7,500.00. O.C.G.A. § 34-9-265(b)(1). If the employee has no dependents, this is the sole death benefit compensation available. Id.

B. Dependency claims.

Those wholly dependent upon the decedent are entitled to regular weekly benefits computed in accordance with O.C.G.A. § 34-9-261 for “total incapacity” for up to 400 weeks from the date of

injury. O.C.G.A. § 34-9-265(b)(2). If the employee leaves dependents who are only partially dependent on his or her earnings for their support at the time of the injury, the weekly compensation for these dependents shall be in the same proportion to the compensation for persons wholly dependent as the average amount contributed weekly by the deceased to the partial dependents bears to the deceased employee's average weekly wages at the time of the injury. O.C.G.A. § 34-9-265(b)(3). These benefits are payable only during dependency. O.C.G.A. § 34-9-265(c). There is a conclusive presumption of total dependency for a spouse and any minor children, as well as non-minor children who are physically or mentally incapable of earning a livelihood or are full-time students under the age of 22. O.C.G.A. § 34-9-13(b). Where one of the presumptions is not applicable, the facts at the time of the accident are taken into consideration. However, any dependency must have existed for a period of three or more months prior to the injury. O.C.G.A. § 34-9-13(d).

Likewise, partial dependency is determined based upon the facts at the time of the accident, but if there is one or more persons wholly dependent, then no benefits for partial dependency are due. Dependency can be terminated by remarriage, death, or emancipation (age 18), unless physically or mentally incapacitated. Meretricious relationships can also terminate dependency. O.C.G.A. § 34-9-13(e).

There is a 20% statutory penalty, up to \$20,000.00, applicable to death resulting from an injury proximately caused by the intentional act of the employer, if the employer had actual knowledge that the intended act was certain to cause the injury and knowingly disregarded this certainty of injury. O.C.G.A. § 34-9-265(e). Flagrant disregard of workplace safety regulations could subject an employer to this penalty.

Compensation to a surviving spouse, when there is no other dependent for one year or less after the death of the employee, is limited to \$150,000.00. O.C.G.A. § 34-9-265(d).

26. What are the criteria for establishing a "second injury" fund recovery?

The Subsequent Injury Trust Fund was established for injuries occurring on or after July 1, 1977. O.C.G.A. § 34-9-352. This is a reimbursement mechanism for the employer/insurer. There are three requirements: (i) the employee had a pre-existing permanent impairment; (ii) the employer had knowledge of the impairment; and (iii) merger of a subsequent injury with the pre-existing permanent impairment. O.C.G.A. § 34-9-363.1.

Since this statutory scheme is a reimbursement mechanism, the employer/insurer must pay all compensation and medical expenses. Notice to the Fund must be given not later than 78 calendar

weeks following an injury or the payment of an amount equivalent to 78 weeks of income or death benefits, whichever occurs last. O.C.G.A. § 34-9-362. The second injury fund will not accept claims for injuries after June, 30, 2006. O.C.G.A. § 34-9-368.

The Fund has been terminated with regard to self-insured employers or insurers for subsequent injuries for which a claim is made occurring after June 30, 2006. Claims made prior to this date that qualify for reimbursement will still be reimbursed. O.C.G.A. § 34-9-368.

27. What are the provisions for re-opening a claim for worsening of condition, including applicable limitations periods?

The time for the filing of a claim for a change in condition is generally two (2) years from the last payment of income benefits, though this period may be tolled if there are any benefits outstanding which have not been paid. O.C.G.A. § 34-9-104(b).

28. What situation would place responsibility on the employer to pay an employee's attorney fees?

There are two such situations, both based upon unreasonable behavior: (i) where a proceeding is brought, prosecuted, or defended without reasonable grounds; or (ii) where some provision of O.C.G.A. § 34-9-221 has not been observed, without reasonable grounds, and the employee engages the services of an attorney who successfully enforces the employee's rights. O.C.G.A. § 34-9-108. Employers should make certain that any attorney's fee problems have been resolved by a stipulation filed with the Board. In Don Mac Golf Shaping Co. v. Register, 185 Ga. App. 159, 363 S.E.2d 583 (1987), the employer was required to pay attorney's fees to the fired former attorney for the employee. See also Yates v. Hall, 189 Ga. App. 885, 887, 377 S.E.2d 887 (1989).

NOTE: An award of attorneys' fees for an employer's failure to observe any of the ministerial functions within O.C.G.A. § 34-9-221 are now based solely on *quantum meruit*. O.C.G.A. § 34-9-108(b)(2). Thus, employees' attorneys are no longer routinely permitted to recover contingent fees in this type of assessment.

EXCLUSIVITY/TORT IMMUNITY

29. Is the compensation remedy exclusive?

A. Scope of immunity.

Employers enjoy virtually absolute immunity from suit in tort under the exclusive remedy doctrine of Georgia's Workers' Compensation Act. See O.C.G.A. § 34-9-11. Immunity also extends to statutory employers, co-employees, alter-egos, and the employer's insurer. See, e.g., Warden v. Hoar Constr. Co., 269 Ga. 715, 716, 507 S.E.2d 428 (1998) (statutory employers); Doss v. Food Lion, Inc., 267 Ga. 312, 312, 477 S.E. 2d 577 (1996) (co-employees); Drury v. VPS Case Mgmt. Servs., 200 Ga. App. 540, 541, 408 S.E.2d 809 (1991) (employer's alter-ego); Coker v. Great Am. Ins. Co., 290 Ga. App. 342, 344, 659 S.E.2d 625 (2008) (employer's insurer).

B. Exceptions (intentional acts, contractual waiver, "dual capacity," etc.).

Georgia has a very strict exclusive remedy doctrine. If an insurer issues both workers' compensation and general liability policies, but limits its inspection of the insured's premises to its role as a workers' compensation carrier, the insurer is entitled to the immunity afforded the employer under the Workers' Compensation Act with regard to tort claims of insured employees. Newton v. Liberty Mut. Ins. Co., 148 Ga. App. 694, 694, 252 S.E.2d 199 (1979); see also U.S. Fire Ins. Co. v. Day, 136 Ga. App. 359, 221 S.E.2d 467 (1975). An employer may, however, contractually waive its immunity under the exclusive remedy doctrine. See Stafford Enters., Inc. v. Am. Cyanamid Co., 164 Ga. App. 646, 297 S.E.2d 307 (1982); Binswinger Glass Co. v. Beers Constr. Co., 141 Ga. App. 715, 234 S.E.2d 363 (1977).

30. Are there any penalties against the employer for unsafe working conditions?

No. Moreover, nothing in Georgia's Workers' Compensation Act works to enhance the remedies available to the employee. See Reid v. Lummus Cotton Gin Co., 58 Ga. App. 184, 197 S.E. 904 (1938). Also, the WCA does not function in a similar fashion to OSHA, for instance. However, the WCA does not exempt an employer from any penalty which may otherwise be imposed for failure or neglecting to perform any statutory duty. O.C.G.A. § 34-9-9.

31. What is the penalty, if any, for an injured minor?

None.

32. What is the potential exposure for "bad faith" claims handling?

Such potential exposure would be limited in this context to possible attorney's fees penalties and litigation expenses related to unreasonable behavior. There are various administrative penalties which may be assessed for late filings and the like, and civil fines may be imposed for flagrant violations of Board rules. O.C.G.A. § 34-9-108.

33. What is the exposure for terminating an employee who has been injured?

None. Georgia follows the general rule that employment relationships are terminable at will by either the employer or the employee, absent a controlling agreement specifying the terms of the employment. O.C.G.A. § 34-7-1; Balmer v. Elan Corp., 278 Ga. 227, 228, 599 S.E.2d 158 (2004). However, a terminated employee with an existing injury may successfully pursue a change in condition claim if he or she can show that the employment related injury prevents him or her from obtaining suitable alternative employment.

THIRD PARTY ACTIONS

34. Can third parties be sued by the employee?

Yes, the injured employee can sue third parties responsible for the employee's injuries. See O.C.G.A. § 34-9-11(a) (third-party tort-feasors are not protected by the exclusivity provision of the Workers' Compensation Act). Moreover, the employer or its insurer also can bring civil suits against third parties, or, alternatively, can intervene in any suit brought by an injured employee against third parties, but only to the extent of the workers' compensation lien. See Section 36 below.

35. Can co-employees be sued for work-related injuries?

No. O.C.G.A. § 34-9-11(a). See also Doss v. Food Lion, Inc., 267 Ga. 312, 477 S.E.2d 577 (1996).

36. Is subrogation available?

Yes, under limited circumstances. O.C.G.A. § 34-9-11.1(b). If an employee fails to bring an action within one year after the injury, the employer or the employer's insurer may file suit to enforce the employee's claim. O.C.G.A. § 34-9-11.1(c). The employer or the employer's insurer may recover only if the employee has been "fully and completely compensated" for all economic and

non-economic losses incurred as a result of the injury. O.C.G.A. § 34-9-11.1(b). There is no bright-line test for the full compensation standard, and this is the primary area of litigation and reported decisions. The employer/insurer has the right to intervene to protect the lien, and, indeed, it has been held that the failure to do so may constitute a waiver of the right to collect on the lien against a recovery by the employee because the employer/insurer has no way to prove that the employee recovered more than what was required to fully compensate him for his economic and non-economic losses. See Canal Ins. Co. v Liberty Mut. Ins. Co., 256 Ga. App. 866, 570 S.E.2d 60 (2002).

MEDICALS

37. Is there a time limit for medical bills to be paid, and are penalties available for late payment?

Yes. Medical bills typically must be paid within 30 days from the date of receipt of the charge, and penalties are available for late payment. O.C.G.A. §§ 34-9-203(c)(1), (3). However, payment of mileage expenses must occur within 15 days, rather than 30 days. O.C.G.A. § 34-9-203(c)(1), (2). Board Rule 203 governs the payment of medical expenses. Medical expenses are limited to the usual and customary charges as found by the Board pursuant to O.C.G.A. § 34-9-205, and in accordance with the fee schedule adopted by the Board. The employer and the provider may seek relief by using a peer review system for contested charges. Board Rule 203 was changed, effective July 1, 2007, to provide that any challenge by a medical provider to the amount of payment for goods, services, or expenses must be submitted to the payor within 120 days of payment, and that failure by a medical provider to challenge the amount of payment of such goods, services or expenses within the 120 day time limit constitutes a waiver of additional payment. Board Rule 203(b)(2). A provider whose bill is reduced by the Board may not seek additional payment from the employee. See *also* Board Rule 203(c)(7).

Georgia law provides that penalties for late payment of medical bills shall be added to such charges and shall be paid to the medical provider at the same time as and in addition to the charges claimed for the health care goods or services. O.C.G.A. § 34-9-203(c)(3). Any payment of charges made between 30 and 60 days after the due date shall be assessed a penalty of ten percent of the charges. Id. Any payment of charges made between 60 and 90 days after the due date shall be assessed a penalty of 20 percent of the charges. Id. Payment of any charges more than 90 days after the due date, in addition to the 20 percent add-on penalty, shall include interest on that combined sum at a rate of twelve percent per annum from the 91st day after the due date until full payment is made. Id.

38. What, if any, mechanisms are available to compel the production of medical information (reports and/or authorization) at the administrative level?

The parties to a claim are required to exchange copies of medical records that are intended to be used in evidence prior to the hearing. There is no physician-patient privilege in Georgia, and the expectation of confidentiality (even as to psychiatric records, which are privileged at common law) is waived to the extent that physical condition is placed into issue by filing a claim. O.C.G.A. § 34-9-207. The State Board of Workers' Compensation is empowered to compel third parties to release medical records, but since these providers are usually looking to the litigation to pay their bills, and because they often charge high reproduction costs, this is rarely a problem.

Georgia law explicitly provides that where an employee refuses to provide a signed release for medical information as required by O.C.G.A. § 34-9-207, and the Board finds that such refusal was not justified under that statute, the employee will not be entitled to *any* compensation at any time during the continuance of such refusal *or* to a hearing on the issues of compensability arising from the claim. O.C.G.A. § 34-9-207(c).

39. What is the rule on (a) Claimant's choice of a physician; (b) Employer's right to second opinion and/or Independent Medical Examination?

A. Claimant's choice of a physician.

The employee is limited to a selection from a panel of at least six physicians or associations selected and maintained by the employer. In the absence of such a panel, the employee may select any physician or medical provider. Board Rule 201(c). The physician or medical provider so selected by the employee becomes the authorized treating physician. The employee thereafter may make one change from that physician to another physician without approval of the employer and without an order of the Board. Any further change of physician or treatment, however, must be made in accordance with O.C.G.A. § 34-9-200 and Board Rule 200. Care should be exercised in referral situations so as not to lose control over the medical providers. Any referral by an authorized treating physician will result in coverage for the medical expenses incurred as a result of such referral, unless the employer properly and promptly contests such referral. See O.C.G.A. § 34-9-201; Board Rule 201(b).

B. Employer's right to a second opinion and/or Independent Medical Examination.

The employer/insurer has a right, upon proper notice and payment of travel expenses, to a second opinion or independent medical examination (IME) with the doctor of the employer/insurer's choice. O.C.G.A. § 34-9-202(a). Under certain circumstances and with certain limitations, the

employee also may be entitled to a one-time IME at the employer's expense. O.C.G.A. § 34-9-202(e). Medical examinations authorized under O.C.G.A. § 34-9-202 expressly include psychiatric and psychological examinations. O.C.G.A. §§ 34-9-202(a), (e).

40. What is the standard for covered treatment (e.g. chiropractic care, physical therapy, etc.)?

For all injuries occurring on or before June 30, 2012 and for injuries considered catastrophic (pursuant to O.C.G.A. § 34-9-200.1) after July 1, 2013, a covered employee is entitled to medical, surgical, hospital care, and other treatment, items, and services, as prescribed by a licensed physician. O.C.G.A. § 34-9-200(a). The employee is also entitled to whatever medical and surgical supplies, artificial members, and prosthetic devices and aids damaged or destroyed in a compensable accident, which in the judgment of the Board are reasonably required and appear likely to effect a cure, give relief, or restore the employee to suitable employment. Id.

The employer's liability for expenses relating to medical, surgical, hospital service, or other treatment required, when ordered by the board, is expressly limited to "such charges as prevail in the State of Georgia for similar treatment of injured persons of a like standard of living when such treatment is paid for by the injured persons." O.C.G.A. § 34-9-203(a). Medical expenses are limited to the usual and customary charges as found by the Board. *See* O.C.G.A. § 34-9-205; Board Rule 203. In addition to the fees of physicians and charges of hospitals, the Board also has authority as to charges for prescription drugs and other items and services. Medical expenses, in addition to those owed the treating physician, can include: (i) reasonable costs of attendant care, directed or ordered by the treating physician during travel or convalescence; (ii) reasonable costs of travel between home and the place of examination or treatment or physical therapy, or the pharmacy (paid at a rate of 40 cents per mile, subject to change based upon changes in fuel costs, per Board Rule 203(e)); (iii) physical therapy prescribed by the treating physician; (iv) hospital charges, if hospitalized at the direction of the treating physician, or an emergency; and (v) prosthetic devices. *See* Board Rule 203; O.C.G.A. § 34-9-200(a). Chiropractic care is a required element of care under the conformed panel and managed care models. *See* Board Rules 201, 208. An employee must submit a claim for mileage expenses within one year of the date of incurring those expenses or is deemed to have waived his or her right to collect such charges from the employer or its workers' compensation insurer. O.C.G.A. § 34-9-203(c)(4).

41. Which prosthetic devices are covered, and for how long?

Medical and surgical supplies, artificial members, and prosthetic devices and aids damaged or destroyed in a compensable accident and which are prescribed by the authorized treating physician could be covered for life if, in the judgment of the State Board, they are reasonably required to effect a cure, give relief, or restore the employee to suitable employment, assuming

there is no settlement of this aspect of the claim. O.C.G.A. § 34-9-200(a).

42. Are vehicle and/or home modifications covered as medical expenses?

Such modifications can be covered as medical expenses, if they are shown to be reasonably required to affect a cure, give relief, or restore the employee to suitable employment. These expenses are often part of a rehabilitation program. The Board is empowered to order such modifications in catastrophic cases. See Board Rule 200.1(a)(5)(ii) (“An Independent Living Plan encompasses those items and services, including housing and transportation, which are reasonable and necessary for a catastrophically injured employee to return to the least restrictive lifestyle possible.”).

43. Is there a medical fee guide or schedule, or other provisions for cost containment?

Yes, the Board is required to annually publish a list, by geographical location, of the usual, customary, and reasonable charges for all medical services provided. O.C.G.A. § 34-9-205. Challenges by medical providers of the amount of payments received from the payor must be made within 120 days of payment. Failure to meet the 120 day deadline will result in a waiver of additional payment for medical goods, services, or expenses. Board Rule 203(b)(2).

44. What, if any, provisions or requirements are there for "managed care"?

An employer may provide employees with controlled access to medical care by posting a list of at least six medical providers ("Posted Panel"). In 1994, the legislature also introduced the concept of a "Conformed Panel of Physicians." O.C.G.A. § 34-9-201. The Conformed Panel, an interim step between the posted panel and true managed care, must contain at least ten physicians of various specified types. An employer may also provide authorized care through a managed care organization, which must be certified by the Board according to very detailed and specific requirements, and which must provide a specified broad range of services and providers. See O.C.G.A. § 34-9-201(b)(3); Board Rule 208(a)(1)(E).

PRACTICE/PROCEDURE

45. What is the procedure for contesting all or part of a claim?

A claim is contested by filing a Notice to Controvert, either as part of the Employer's First Report of Injury (Form WC-1), or as a separate Notice to Controvert (Form WC-3). The filing is governed by one of three standards, which are dependent on the time of filing. To controvert a claim from the start, a Form WC-1 (complete Section C) or a Form WC-3 must be filed within 21 days of the employer's knowledge of the injury or death. See O.C.G.A. § 34-9-221; Board Rules 61, 221. If the employer decides to controvert a claim after the initial 21 days, but prior to expiration of 60 days from the due date of the first benefits, then the employer should file two forms—a Form WC-3 Notice to Controvert and a Form WC-2 Notice of Payment or Suspension of Benefits. The last standard governs controverting a claim after the expiration of 81 days from first notice. Here, Forms WC-2 and WC-3 are required, and the claim may only then be contested upon a change in condition or newly discovered evidence; both types of contests have been the subject of many published court opinions. An employer must be careful to pay all payments due, including any statutory penalty for late payments, if it wants to preserve its right to contest a claim at a later date, although failure to make such payments will not prevent the employer from contesting a claim based on a change in condition. See Fallin v. Merritt Maint. & Welding, Inc., 283 Ga. App. 485 (2007).

46. What is the method of claim adjudication?

A. Trial court.

Hearings are conducted before an administrative law judge (“ALJ”) of the trial division of the State Board of Workers’ Compensation. O.C.G.A. § 34-9-47(c). The rules applicable to such hearings are found in O.C.G.A. § 34-9-102. The hearing rules will change on January 1, 2013. There is no right to a jury trial. Liberty Mut. Ins. Co. v. Johnson, 244 Ga. App. 338, 340, 535 S.E.2d 511, 513-14 (2000); Metro. Cas. Ins. Co. v. Huhn, 165 Ga. 667, 142 S.E. 121 (1928).

B. Appellate.

There are three levels of appellate review available:

- (1) *Review by the Appellate Division of the State Board of Workers’ Compensation.* The appellate panel is composed of members of the Board serving as appellate ALJs. O.C.G.A. § 34-9-47. Any party may review. The application for review must be made to the appellate division within 20 days of notice of the award of the administrative law judge in the trial division. The standard of review is whether the award is supported by a preponderance of competent and credible evidence contained within the record. O.C.G.A. § 34-9-103.

(2) *Review by the Superior Court.* Review is also available in the superior court of the county in which the injury occurred, or, if the injury occurred outside the state, to the superior court of the county in which the original hearing was held. O.C.G.A. § 34-9-105(b). The superior court is not empowered to substitute its judgment for the judgment of either the ALJ or the full Board, and can set aside the Board's decision only upon a showing that (i) the Board acted outside its powers, (ii) the decision was procured by fraud, (iii) the facts found by the Board do not support the decision, (iv) the competent evidence in the record was insufficient to support the Board's decision, or (v) the decision was contrary to law. O.C.G.A. § 34-9-105(c). The standard of review outlined above has been interpreted consistently as meaning that the findings of fact of the ALJ or those of the Board are conclusive and binding on the superior court if supported by any evidence in the record. See Ray Bell Constr. Co. v. King, 281 Ga. 853, 854, 642 S.E.2d 841, 843 (2007); St. Joseph's Hosp. v. Ward, 300 Ga. App. 845, 846, 686 S.E.2d 443, 444 (2009).

(3) *Discretionary appeals to the Court of Appeals or Georgia Supreme Court.* Such appeals must be submitted in the form of an application for certiorari, which is seldom granted. See O.C.G.A. § 34-9-105(e).

47. What are the requirements for stipulations or settlements?

All stipulations and settlements must be submitted for approval to the Board in the form of a "Stipulation and Agreement." There are two forms: a compromise stipulation and a no-liability stipulation. A compromise stipulation sets forth opposing contentions of the parties, the fact that a settlement has been reached, and the terms of the settlement. It is submitted when there is a bona fide dispute as to the facts, the determination of which will materially affect the right of the employee or dependent to recover compensation or the amount of compensation which would be recovered or under circumstances when there is a dispute as to the applicability of the Act. Once compensation in any form (including medical benefits) is paid, then this is the only manner by which a claim may be settled. O.C.G.A. § 34-9-15; Board Rule 15. In addition, where a case is being settled with a claimant who is represented by an attorney, and where that attorney is seeking payment for his or her expenses out of the settlement, the attorney must certify that the expenses comply with Rule 1.8(e) of the Georgia Rules of Professional Responsibility and Board Rule 108. Board Rule 15(e).

"No liability" stipulations have been sanctioned by the courts. See Lavender v. Zurich Ins. Co., 110 Ga. App. 196, 138 S.E.2d 118 (1964). These involve the submission of an agreement between the parties that no compensation is owed and the simultaneous execution of a Covenant Not to Sue. Once approved, an order is issued by the Board finding, as a matter of fact and law, that no

compensation is owed. Payment is then made pursuant to the terms of the covenant.

48. Are full and final settlements with closed medicals available?

Yes.

49. Must stipulations and/or settlements be approved by the state administrative body?

Yes. *See* Section 47.

RISK FINANCE FOR WORKERS' COMPENSATION

50. What insurance is required, and what is available (e.g. private carriers, state fund, assigned risk pool, etc.)?

All employers subject to the Act must insure the payment of compensation. *See* O.C.G.A. §§ 34-9-120, 34-9-121. By law, unless otherwise ordered or permitted by the Board, insurance must be secured from a "corporation, association, or organization licensed by law to transact the business of workers' compensation insurance in this state or from some mutual insurance association formed by a group of employers so licensed; or such employer shall furnish the board with satisfactory proof of his financial ability to pay the compensation directly in the amount and manner and when due." O.C.G.A. §§ 34-9-121(a). Thus, insurance is available through private insurers, trade associations, professional associations, and group self-insurance funds.

51. What are the provisions/requirements for self-insurance?

A. For individual entities.

To qualify, application must be made to the Board, and security must be made by way of a bond. *See* O.C.G.A. §§ 34-9-121, 34-9-127.

B. For groups or "pools" of private entities.

Detailed requirements are codified for group self-insurance funds. *See* O.C.G.A. §§ 34-9-150, *et seq.* Such funds are also subject to regulation by the Georgia Insurance Department.

52. **Are “illegal aliens” entitled to benefits of workers’ compensation in light of The Immigration Reform and Control Act of 1986, which indicates that they cannot lawfully enter into an employment contract in the United States, although most state acts include them within the definition of “employee”?**

Yes. The Georgia Court of Appeals repeatedly has held that an illegal alien who presented fraudulent papers to gain employment nevertheless is an “employee” under the Workers’ Compensation Act, and therefore is entitled to benefits. See Martines v. Worley & Sons Constr., 278 Ga. App. 26, 29-30, 628 S.E.2d 113, 115-16 (2006); Earth First Grading v. Gutierrez, 270 Ga. App. 328, 606 S.E.2d 332 (2004); Cont’l Pet Techs., Inc. v. Palacias, 269 Ga. App. 561, 604 S.E.2d 627 (2004).

53. **Are terrorist acts or injuries covered or excluded under workers’ compensation law?**

There do not appear to have been any terrorist act cases in Georgia to date, but the laws relating to third party criminal acts likely would guide such cases. In that regard, the fact that an injury is the result of a willful or criminal act committed by a third party does not prevent recovery, as long as the injury arises out of the employment. Zamora v. Coffee Gen. Hosp., 162 Ga. App. 82, 84, 290 S.E.2d 192 (1982); Hartford Accident & Indem. Co. v. Cox, 101 Ga. App. 789, 115 S.E.2d 452 (1960). An exception exists where the third party’s actions are directed against the employee for personal reasons, in which case there can be no recovery. See Employers Ins. Co. v. Wright, 108 Ga. App. 380, 381, 133 S.E.2d 39, 40 (1963); Pinkerton Nat’l Detective Agency v. Walker, 30 Ga. App. 91, 94, 117 S.E.2d 281, 283 (1923). Further, O.C.G.A. § 34-9-17(a) provides that there is no compensation for injury or death due to an employee’s willful misconduct, including intentional self-inflicted injuries. See Section 5.C. above. “Willful” is defined as a premeditated, obstinate, or intentional act. Armour & Co. v. Little, 83 Ga. App. 762, 766, 64 S.E. 2d 707, 710 (1951).

54. **Are there any state specific requirements which must be satisfied in light of the obligation of the parties to satisfy Medicare’s interests pursuant to the Medicare Secondary Payer Act?**

Yes. These issues are controlled by federal law. Practitioners must account for both Medicare and Medicaid liens in effecting settlement. See 42 U.S.C. §§ 1395, *et seq.* (Medicare); 42 U.S.C. §§ 1396, *et seq.* (Medicaid). 42 U.S.C. § 1395y(b)(2)(B)(i), part of the complex Medicare statute, specifically states that repayment is required and is “conditioned on reimbursement.”

Under Medicare regulations, Medicare is secondary payer to the payment of workers’ compensation by a workers’ compensation carrier or self-insured employer; the obligation to pay medicals for a compensable condition cannot be shifted to Medicare. See 42 C.F.R. § 411.46. Therefore, Medicare has an interest in all lump sum settlements of a workers’ compensation matter if at the time of the settlement the employee meets the following criteria: (i) the employee is already a Medicare enrollee, and the settlement amount is greater than \$25,000; or (ii) there is a reasonable expectation that the employee will be a Medicare enrollee within 30 months of the settlement *and* the settlement amount is greater than \$250,000.

If the employee meets these criteria, Medicare must be notified in the event of a settlement. Upon review of the file, if Medicare concludes that the settlement does not meet its criteria, it may require a Medicare set-aside trust for large settlements or a custodial self-administered trust account. See 42 C.F.R. § 411; 42 U.S.C. § 1395.

Under revised Board Rule 15(d), if a stipulated settlement agreement provides for a Medicare Set-Aside Arrangement (MSA), the stipulated settlement agreement must contain a provision as to the actual cost or projected cost of the MSA.

Medicare enforcement varies by geographical region. Consult your ALFA lawyer for the current practice in your state for this evolving area of the law.

55. How are subrogation liens of Medicaid and health insurers treated under workers' compensation law?

The federal Medicaid statute requires states to include in their plan for medical assistance provisions both (i) that the individual will assign to the state any rights to payment for medical care from any third party, and (ii) that the individual will cooperate with the state in pursuing any third party who may be liable to pay for care and services available under the Medicaid plan. See 42 U.S.C. §§ 1396k(a). The state is authorized to retain an amount as necessary to reimburse it (and the federal government, as appropriate) for medical assistance payments and to pay the remainder to the individual. See 42 U.S.C. § 1396k(b).

Pursuant to O.C.G.A. § 34-9-206, any party to a claim, including a group insurance carrier or health care provider, who covered the cost of medical treatment to an injured claimant may give notice to the Board, "at any time during the pendency of the claim," that such party has a right to payments. In addition, with regard to Medicaid, one must look to both federal and state law, since Medicaid is a cooperative program. The requirements for obtaining Medicaid funds are set forth in 42 U.S.C. § 1396, whereas O.C.G.A. § 49-4-149 addresses the authority of the governing body to collect the funds by filing a lien within one year from the date of the last item of treatment. This lien must be filed in the county where the recipient lives and in Fulton County. O.C.G.A. § 49-4-149(b). The practitioner should check for all types of liens.

56. What are the requirements for confidentiality and privacy of medical records under workers' compensation law and how are they affected by state and federal law (HIPAA)?

Georgia does not recognize a physician-patient privilege. See Nat'l Stop Smoking Clinic-Atlanta, Inc. v. Dean, 190 Ga. App. 289, 289, 378 S.E.2d 901, 902 (1989). However, communications between a patient and psychiatrist or licensed psychologist are recognized as an enforceable privilege. O.C.G.A. § 43-39-16. As noted in Section 38 above, any such privilege is waived to the extent the claimant places his or her physical or mental condition in issue. See O.C.G.A. § 34-9-207.

The 1996 Health Insurance Portability and Accountability Act (HIPAA), 45 C.F.R. §§ 164 *et seq.*, contains numerous provisions intended to protect insureds. One provision seeks to prevent discrimination and to

protect insured privacy rights, but an exception exists for workers' compensation claims so as to allow for collection of medical records related to the injury by employers and insurers. 45 C.F.R. § 164.512(l). Regarding ex parte communications between a treating physician and an employer, HIPAA does not preempt Georgia law allowing such communications "because HIPAA exempts from its requirements disclosures made in accordance with state workers' compensation laws." Arby's Rest. Group, Inc. v. McRae, 292 Ga. 243, 245–46 (2012). However, parties requesting ex parte communications with treating physicians must "set parameters consistent with privacy protections afforded under state and federal law." Id. at 247.

57. What are the provisions for "Independent Contractors"?

Independent contractors are not covered under Georgia's Workers' Compensation Act. The chief test, though not an all-inclusive one, to be applied in determining whether a worker is an independent contractor or an employee is whether the employer has the right to assume control of the manner, method, and time of his work. Golosh v. Cherokee Cab Co., 226 Ga. 636, 176 S.E.2d 925 (1970); Rapid Group, Inc. v. Yellow Cab of Columbus, Inc., 253 Ga. App. 43, 46, 557 S.E.2d 420, 424 (2001); O.C.G.A. § 34-9-2(e). An employer may bring an independent contractor under the purview of workers' compensation by providing workers' compensation insurance for him. O.C.G.A. § 34-9-124(b). When an employer of an independent contractor provides workers' compensation insurance to him, the employer is estopped from denying coverage for a compensable claim even though the employer was not required to provide coverage in the first place. Murph v. Maynard Fixturecraft, Inc., 252 Ga. App. 483, 555 S.E.2d 845 (2001).

58. Are there any specific provisions for "Independent Contractors" pertaining to professional employment organizations/temporary service companies/leasing companies?

No.

59. Are there any specific provisions for "Independent Contractors" pertaining to owner/operators of trucks or other vehicles for driving or delivery of people or property?

Yes. An owner-operator, defined as an equipment lessor who leases vehicular equipment with a driver to a carrier, is deemed an independent contractor and not covered under the Workers' Compensation Act. O.C.G.A. §§ 40-2-87(19), 34-9-1(2). A federal law governing interstate motor carriers does not preempt clear Georgia law embodied in the statute deeming the owner-operator of a tractor trailer an independent contractor for workers' compensation purposes. Upshaw v. Hale Intermodal Transp. Co., 224 Ga. App. 239, 480 S.E.2d 277 (1997). The exclusion for owner-operators does not apply, however, to the owner-operator's employees. C. Brown Trucking, Inc. v. Rushing, 265 Ga. App. 676, 595 S.E.2d 346 (2004).

60. What are the "Best Practices" for defending workers' compensation claims and controlling workers' compensation benefits costs and losses?

Financial exposure to workers' compensation is an expensive and complex challenge for every business. The best means for reducing and eliminating that exposure is a strong and individualized "Best Practices" plan.

Every business must deal with the expense of workers' compensation in its risk management and in dealing with the inevitable claim. The best approach to ameliorating a business exposure is a strong and individualized "Best Practices" plan.

The ALFA affiliated counsel who compiled this State compendium offers an expert, experienced and business-friendly resource for review of an existing plan or to help write a "Best Practices" plan to guide your workers' compensation preparation and response. No one can predict when the need will arise, so ALFA counsels that you make it a priority to review your plan with the ALFA Workers' Compensation attorney for your state, listed below:

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